

# Dreaming Denationalized Law – Scholarship on Autonomous International Arbitration as Utopian Literature

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\* Arthur Larson Professor, Duke University School of Law. This article is based on a lecture given at the London School of Economics in the fall of 2011. It still maintains some of the experimental character of a lecture, and does not purport to offer comprehensive references, especially on the topics of arbitration and *lex mercatoria*. I thank Nicola Lacey, Rebecca Myers, Annelise Riles and Peer Zumbansen for valuable comments and discussions.

## I. Introduction: International Arbitration and No-Place law

I should like to begin with a quote:

Do you dream? When do you dream? What do you dream about? Do you dream about international arbitration? Is there a dream for international arbitration? Is the concept of delocalised arbitration, or arbitration not controlled by national law, a dream or a nightmare?<sup>1</sup>

We might think we heard a psychoanalyst speaking. But we would be wrong. In fact, the quote comes from an arbitration law practitioner, and not just anyone. The speaker was Julian Lew, then the head of arbitration at Herbert Smith, and the occasion was the 20<sup>th</sup> Freshfield Lecture, given in London some five years ago. The title of his presentation was this: 'Achieving the dream – autonomous arbitration'. And the dream itself one of the core concerns of international arbitration—to what extent it can proceed without interference from states.

And Lew is far from the only one who dream. In the subsequent year's Freshfield's lecture, Gabriele Kaufmann-Kohler took up the idea of dreams. Her theme was 'Arbitral Precedent: Dream, Necessity or Excuse?'<sup>2</sup> And once you look, you realize: the literature on transnational law is replete with dreams, visions, and faith. We read about dreams of an adjudicatory system of autonomous arbitration outside the control of states.<sup>3</sup> We find visions of a *lex mercatoria*, a commercial law outside the

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<sup>1</sup> JDM Lew, 'Achieving the dream: autonomous arbitration' (2006) 22. *Arbitration International* 179, 179; republished in JDM Lew and LA Mistelis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (2007) 455. Lew makes clear he views this as a dream, not a nightmare.

<sup>2</sup> G Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 *Arbitration International* 357.

<sup>3</sup> Lew, above n 1; Kaufmann-Kohler, above n 2 at p 363 n 37; M Martinek, *Das internationale Kartellrecht* 97, cited after the translation in Klaus Peter Berger, 'The creeping codification of the new *lex mercatoria*' (2<sup>nd</sup> ed, Kluwer Law International, 2010) 50 ('dream of every conflict of laws lawyer, the idea of substantive decisional

state, created by markets themselves and focused exclusively on the interests and expectations of commerce.<sup>4</sup> We are exhorted to have faith in a new transnational law that helps us transcend state law.<sup>5</sup>

Celia Wasserstein Fassberg pointed to the importance of faith earlier:

For a long time, the existence of *lex mercatoria*, rather like the existence of God, seemed to depend largely on the will to believe. Much early writing on the subject was characterised by an ideological, almost mystical zeal. It was advocacy rather than descriptive or analytical.<sup>6</sup>

Now, to call the literature on transnational law and especially arbitration as ideological and zealous alone is little more than stating the obvious. Much scholarship on international commercial arbitration can hardly be distinguished from advertising.<sup>7</sup> Similarly, it seems hardly novel any longer to point out that this zealous advocacy frequently masks a poverty of theoretical foundations. In particular, it has long been shown that the idea of an autonomous transnational commercial law is not only elusive but also an ideology, a continuation of the long-

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harmony that does away with traditional conflict of laws rules, leading to the vision of eternal peace that stands behind the idea of the law as such’); C Brower, C Brower II and J Sharpe, ‘The coming crisis in the global adjudication system’ (2003) 19 *Arbitration international* 424, 436.

<sup>4</sup> Klaus Peter Berger, *The Creeping Codification of the new lex mercatoria* (2<sup>nd</sup> ed 2010) 4 (referring to Schmitthoff).

<sup>5</sup> HJ Berman, ‘World Law,: an ecumenical jurisprudence of the Holy Spirit’ (2004) [http://cslr.law.emory.edu/fileadmin/media/PDFs/Lectures/Berman\\_World\\_Law.pdf](http://cslr.law.emory.edu/fileadmin/media/PDFs/Lectures/Berman_World_Law.pdf); see also Dezalay & Garth, eg at p 57, 64.

<sup>6</sup> C Wasserstein Fassberg, ‘Lex mercatoria—hoist with its own petard? (2004) 5 *Chicago Journal of International Law* 67, 68. See also HE Hartnell, ‘Living la Vida Lex Mercatoria’ (2007) *Uniform Law Review* 733, 747: “debates over *lex mercatoria* have “religious” overtones, which implies that they are, at least in some cases, rooted in belief or ideology, and thus tantamount to tenets of faith.” G Teubner, ‘Global Bukowina: legal pluralism in world society’, in: G Teubner (ed), *Global law without a state* (1997), 3, 7 (‘war of faith’).

<sup>7</sup> R Michaels, *Roles and Role Perceptions in International Commercial Arbitration* (forthcoming).

refuted ideology of the neat public/private distinction.<sup>8</sup> And indeed, even a spurious look into the practice of international commercial arbitration and its law reveals that it is not autonomous from the state, but instead presents a complex and interesting amalgam of state and non-state, public and private law.<sup>9</sup>

What is remarkable, however, is how the idea of autonomous transnational law continues to permeate the scholarship despite its proven theoretical and empirical inadequacy. If truly autonomous law outside the state survives as a trope in the literature although it is a known myth, then it is this mythical quality that deserves closer attention. What is interesting is not the ideological but the mystical character of the zeal. What we may need, therefore is not yet another critique of the idea of autonomous non-state law as such, but an analysis of how this idea can survive unharmed by the critique. The more obvious reason lies in the economic interests that participants in international commercial law have in proclaiming their autonomy. The more interesting reason, however, lies in the peculiar, indeed “mystical” character of these proclamations.

This mystical, irrational, character of the scholarship has mostly escaped scrutiny so far. And indeed, to most it may look like mere rhetoric, irrelevant for the main argument, at best a smoke screen. In this text I argue otherwise. In focusing on precisely this mystical angle, I want to ask why faith and dreams and visions are such frequent patterns and what that can tell us about transnational law, both its potential and its limits. I do not want to poke fun at the proponents of such mysticism. Instead, I hope to show that this leap into the irrational is actually

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<sup>8</sup> For the most extensive critical analysis of *lex mercatoria* see AC Cutler, *Private power and global authority: transnational merchant law in the global economy* (2003). The most extensive study of international commercial arbitration is still Y Dezalay & B Garth, *Dealing in virtue: international commercial arbitration and the construction of a transnational legal order* (1998). See also P Zumbansen, *Piercing the legal veil: commercial arbitration and transnational law* (2002) 8 *European law journal* 400.

<sup>9</sup> For arbitration, see, eg, CR Drahozal, *Private ordering and international commercial arbitration* (2009) 113 *Penn State Law Review* 1032; for *lex mercatoria*, see R Michaels, *The true lex mercatoria: private law beyond the state* (2007) 14 *Indiana journal of global legal studies* 447.

characteristic of the situation within which international arbitration finds itself today.

In doing so, I do not aim at drawing an adequate picture of the reality of international commercial arbitration, drawing on close analysis of judicial and arbitral opinion, statistics, interviews etc. Others have done this very well. Nor am I interested even in drawing an accurate and complete picture of the entirety of scholarship on international commercial arbitration. That scholarship is enormous; it is also quite disparate. Instead, I want to focus specifically on that subpart of the literature that proclaims true autonomy of international commercial arbitration. And insofar, I am interested less in its content and more in its form, less in its accuracy and more in its invocation of dreams, faith, visions, utopias.<sup>10</sup> In other words, I suggest analyzing this literature as literature.

These ideas of autonomous arbitration and law outside the state are ideas of a better world: a world governed entirely on the free will of the parties, “free from the controls of parochial national laws”<sup>11</sup>. Arbitration “exists in its own space--a non-national or transnational or, if you prefer, an international domain. It has its own space independent of all national jurisdictions.”<sup>12</sup> This would mean that arbitral awards are truly delocalized. Or, as the French Cour de Cassation said in its 2007 Putrabali decision, “an international arbitral award, which is not linked to any national legal order, is a decision of international justice.”<sup>13</sup> Where national justice, with its petty democratic processes and insistence on civil rights, has failed us, international justice will at last bring us to the promised land.

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<sup>10</sup> Cf K Knop, , ‘Utopia without apology: form and imagination in the work of Ronald St John Macdonald’ (2002) 40 *Canadian Yearbook of International Law* 287 (pointing out the distinction between utopia as substance and utopia as form). The suggestion to distinguish form, substance, and purpose of utopias is explored in Levitas (n \_\_\_\_).

<sup>11</sup> Lew (n 1 above).

<sup>12</sup> Id.

<sup>13</sup> Cour de Cassation, chambre civile, [2007] *Revue de l'arbitrage* 507 (“Putrabali”), praised as a contribution to general legal theory by E Gaillard, ‘La jurisprudence de la Cour de cassation en matière d’arbitrage international’ [2007] *Revue de l'arbitrage* 697, 700.

Such a completely denationalized law is of course a utopia. But it is a utopia not just in the broad sense of being unrealistic, at least for the present, and perhaps also for the future. No, it is a utopia in the very literal sense of the word. Recall what utopia means in Greek: *no place*.<sup>14</sup> Delocalized arbitration, non-state law, is, literally, no-place law. It thus make up a utopia in the central meaning of the term.

This recognition opens up a new avenue towards analyzing the growing literature on a transnational law outside of the state. We should, I suggest, read this literature as utopian literature. And we should therefore place it alongside other examples from the venerable traditions of utopian literature and of dream literature.<sup>15</sup> This provides us with a new and, as I suggest, promising perspective on the burgeoning literature on transnational law. Scholars in the vibrant vield of utopian studies, unlike legal scholars, are not content by pointing out that utopias and myths are unreal. Instead, they point to the precise funtions that utopias and dreams play, in both literature and political argument. They might help us, thus, to move beyond the rather fruitless discussion of whether denationalized law is a myth or a reality.<sup>16</sup> Even if it is a myth, a utopia, we may nonetheless find it interesting as such.

Utopia is both no place (outopia) and good place (eutopia)—a good place that is nowhere, an alternative world, desirable but unachievable or at least, as of yet, unachieved. Utopia is “a particular quasi-human community where sociopolitical

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<sup>14</sup> For a helpful discussion of the concept and its changing meaning over time, see F Vieira, ‘The concept of utopia’ in G Claeys (ed), *The Cambridge companion to utopian literature* (Cambridge, Cambridge University Press 2010) 3. A more broader and analytical approach to the same question is R Levitas, *The concept of utopia* (Hertfordshire: Philip Allan, 1990).

<sup>15</sup> This literature has garnered increased interest in recent decades. A handy introduction into the debates is LT Sargent, *Utopianism—a very short introduction* (Oxford University Press, 2010). A more extensive history is FE Manuel & FP Manuel, *Utopian thought in the western world* (Belknap Press 1979). See also G Claeys, *Searching for utopia: the history of an idea* (Thames & Hudson 2011). The most comprehensive historical analysis of the concept is R Levitas, *The concept of utopia* (1990).

<sup>16</sup> A Kassis, *Théorie générale des usages du contrat* (Paris 1984) 501ff; George Delaume, ‘Comparative analysis as a basis of law in state contracts: The myth of the Lex Mercatoria’ (1989) 63 *Tulane Law Review* 575; see also Cutler (n 8 above) 54-59 (‘Four liberal myths’).

institutions, norms and individual relationships are organised according to a more perfect principle than in the author's community, this construction being based on estrangement arising out of an alternative historical hypothesis."<sup>17</sup> Utopias are not the same as dreams (or visions), but because dreams are avenues to other places, the two are frequently related, as in Lyman Tower Sargent's definition of utopianism as "social dreaming—the dreams and nightmares that concern the ways in which groups of people arrange their lives and which usually envision a radically different society than the one in which the dreamers live."<sup>18</sup> And indeed, so often are utopias presented in dreams, so often are dreams literary devices to present utopias, that an analysis of utopian literature overlaps with an analysis of dream literature. When we speak of dreams, we should also speak of myths, at least if we accept John Campbell's suggestion that "[t]he myth is the public dream and the dream is the private myth."<sup>19</sup> And we should also speak of faith, because faith is what proponents of utopias ask us to have to make these utopias real, to achieve the leap from what is now to what should be.

## II. Dream, Vision, Faith, Utopia, Myth as Tropes

### A. The idea and the reality of non-state law

Invocations of dreams, visions, faith, are, at first sight, surprising. Neither international commercial arbitration nor transnational commercial law is your usual stuff as dreams are made of. Arbitration is, essentially, nothing more than a voluntary dispute resolution mechanism for commercial disputes: parties from different countries opt out of the state courts and instead submit their dispute to a panel of arbitrators that they designate. It seems to be the clearest example of a law

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<sup>17</sup> D Suvin, *Metamorphoses of Science Fiction: On the poetics and history of a literary genre* (New Haven: Yale University Press 1979) 49.

<sup>18</sup> LT Sargent, 'The three faces of utopianism revisited' (1994) 5 *Utopian studies* 1, 3.

<sup>19</sup> J Campbell & Bill Moyers, *The power of myth* (Random House 1991) 48. The earliest formulation of this thought was slightly different. See J Campbell, *The hero with a thousand faces* (1949) 19: "Dream is the personalized myth, myth the depersonalized dream."

devoid of any mythical foundations, based instead entirely in cool economic rationality.

This arbitration has, in reality, never been truly autonomous. States were historically quite suspicious of such perceived attempts to “oust” ordinary courts of their jurisdiction.<sup>20</sup> Today, most states recognize arbitration, but that does not mean that states (and their courts) play no role.<sup>21</sup> At the beginning of the process, states will usually accept a valid arbitration agreement as a barrier to the jurisdiction of courts, so no party can escape its obligations under the arbitration agreement. During the arbitration, states may be called upon to guarantee the orderly proceeding of the arbitral process. At the end of the process, states will freely recognize and enforce arbitral awards under an important treaty, the New York Convention. Parties may call on state courts to help enforce the arbitration agreement, but also to prevent the arbitration or to annul the arbitral award. And indeed, the plea for autonomous international arbitration is, at the same, time the plea to state courts to enforce the results of this arbitration.

The situation is similar for a transnational commercial law outside of states, the so-called new *lex mercatoria*.<sup>22</sup> Here, the frequent story is this: Participants in international trade find the substantive law of nation states inadequate for their contracts. National law is thought to be parochial and ill-adapted to the requirements of the international business community. It is also thought to be insufficiently open to party autonomy. Moreover, there are many state laws, so the

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<sup>20</sup> See the discussion in G Born, *International Commercial Arbitration* (2 vols 2009). There are limits to this recognition however. There are limits for certain types of parties – for example consumers – there are limits for certain types of issues – for example certain parts of public law – and there are limits for certain matters of public policy – for example arms trade.

<sup>21</sup> JDM Lew, ‘Does national court involvement undermine the international arbitration process?’ (2009) 24 *American University International Law Review* 489, 492.

<sup>22</sup> From the vast literature, see only KP Berger, *The creeping codification of the new lex mercatoria* (Kluwer International, 2<sup>nd</sup> ed 2010) with references; J Dalhuisen, Dalhuisen on transnational comparative commercial financial and trade law. Introduction: The new lex mercatoria and its sources (2010).



difficult question arises which of them should be applicable. (Existing rules on choice of law are typically dismissed as being too complex.) As a consequence, so the story continues, market participants create their own laws – through their customs, but also through non-state formulating agencies like the International Chamber of Commerce. The ensuing law is thus created without state participation, even though again states play a crucial role in it: they are asked to recognize *lex mercatoria* as an applicable law.

But again, the story is untrue. The real *lex mercatoria*, if we should call the law of transnational commerce that, is an amalgam between public and private, state and non-state laws and institutions.<sup>23</sup> From the perspective of commerce, it is not clear why autonomous non-state law would necessarily be preferable to state law. Commerce cares little about sources of law per se, and more about effectivity, predictability and substantive quality of law. For some issues, non-state law and institutions will be preferable, for others, state law and institutions will be chosen.

## B. Dreams

Stories of autonomous non-state law are, thus, not true – at least in this world. When Lew calls such law a dream, this enables him to speak of such law although it does not exist in reality. And Lew is not the only scholar to describe arbitration as a dream. Here is a quote from another scholar:

“Reverend Martin Luther King had a history-changing dream, of the end of discrimination. Me, I had a dream about a really great conference on arbitration, and how it might ultimately help lead to legal reform of arbitration.”<sup>24</sup>

The link between Martin Luther King and international arbitration may seem far-fetched, but its invocation is not a single event. Here is another example:

I have a dream that I can create my own forum and choose my own arbiter

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<sup>23</sup> See Michaels, above n 9.

<sup>24</sup> JR Sternlight, ‘Dreaming About Arbitration Reform’ (2008) 8 *Nevada Law Journal* 1, 1 (internal reference omitted).

I have a dream that a special and wise expert in the particular arena of the dispute, whom I trust, can hear my dispute, and I can accept his or her judgment and put the matter behind me, win or lose.

I have a dream that my dispute can be resolved in a private place, so that the indignities, dangers, and damages of a public forum do not compound the upset and anger of being in conflict

I have a dream that arbitrators are charged with ensuring that their corner of the dispute resolution universe offers a fair and clean playing field. No arbitrator will try to coerce settlement by threatening parties with onerous outcomes. Every arbitrator will treat each party with courtesy and respect.<sup>25</sup>

Actually, the Reverend King is perhaps not a wholly unlikely hero of delocalized law. Recall what he writes in his letter from a Birmingham jail (which is mostly a text on legal philosophy and politics)<sup>26</sup>: “Injustice anywhere is a threat to justice everywhere”<sup>27</sup>. Opposition to the American state as it existed then led King to invocations of a society transcending that state. But what makes Dr. King’s “I have a dream” speech so powerful is not just its substance, but also, perhaps primarily, its form. In that speech, Martin Luther King lays out a utopian vision of a world without discrimination, presented as a dream. Importantly, this dream reference is powerful in large part because of its biblical reference. Recall the many dreams in scripture<sup>28</sup> – from Jacob’s ladder through Joseph’s dream assuring him that his wife’s pregnancy

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<sup>25</sup> Lela P Love, ‘Images of Justice’ (2001) 1 *Pepperdine Dispute Resolution Journal* 29.

<sup>26</sup> See only D Sturm, ‘Crisis in the American Republic: The legal and political significance of Martin Luther King’s Letter from a Birmingham jail (1984) 2 *Journal of Law and Religion* 309.

<sup>27</sup> Martin Luther King, Jr., Letter from a Birmingham Jail, April 16, 1963. The quote appears on the website of the American International Commercial Arbitration Court (<http://court-inter.us/node/88>) and is used occasionally in arbitration scholarship. See, eg, D Ellinghausen Jr, ‘Justice Trumps Peace: the Enduring Relevance of Owen Fiss’s Against Settlement’, <http://pegasus.rutgers.edu/~rcrlj/articlespdf/ellinghausen.pdf>; LE Coutelier, ‘Annulment and Court Intervention in International Commercial Arbitration’ (2011) <http://ssrn.com/abstract=195727> at 27.

<sup>28</sup> Jean-Marie Husser, *Dreams and dream narratives in the Biblical world* (1999).

was not due to adultery – all the way to the Book of Revelations. And recall which function they have. Through dreams, God speaks to us. Through dreams we see a truth that is otherwise unattainable to us as of now, but a truth that is about to come. In this sense, dreams are not *less* but *more* true than our everyday reality.<sup>29</sup> In Russel's words, "Like the voice of God speaking through the mouths of the prophets, the dream motif is a technique for normalizing and exteriorizing—for "realizing" in the original sense of that word—the sure and special presence of God."<sup>30</sup>

### C. Visionaries

An arbitrator who dreams thus speaks not of himself but instead of his views of another, better, and world. Through dreaming, he becomes a *mediator* between our world and that other world—a medium, connecting the audience with a truth, whether God's or someone else's. Like a mediator in dispute resolution, who merely connects the parties without interfering himself, the arbitration scholar-as-dreamer merely connects his audience with the truth of autonomous arbitration, without his own intervention. This means that the speaker himself is insignificant; what matters is the truth he holds, arising from faith and thus closer contact to God. Here is an example from Hildegard of Bingen, the medieval visionary nun:

I, a poor little form and earthen vessel, speak these things not from myself but from the serene light: Man is a vessel which God fashioned for himself, which he imbued with his spirit, so that he might accomplish his works in him; for God does not work as man does but by the order of his command all things are carried out.<sup>31</sup>

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<sup>29</sup> Cf JF Priest, Myth and dream in Hebrew Scripture, in J Campbell (ed), *Myths, Dreams and Religion* (New York: EP Dutton and Co 1970) 48, 59-60.

<sup>30</sup> JS Russell, *The English Dream Vision—Anatomy of a Form* (Columbus OH, Ohio State University Press 1988) at 30.

<sup>31</sup> Hildegard of Bingen, Letter to Elisabeth of Schoenau, available at <http://epistolae.ccnmtl.columbia.edu/letter/125.html>. On the rhetoric behind this, see, eg BS Rapp, 'A woman speaks: language and self-representation in Hildegard's letters' in M Burnett McNerney (ed), *Hildegard of Bingen: a book of essays* (Taylor & Francis 1998) 3, 5; cf. more generally GTW Ahlgren, Visions and rhetorical strategy in the letters of Hildegard of Bingen, in K Cherewatuk and U Wiethaus (eds), *Dear*

And here is another example expressing the exact same thought, this one from the foreword to an Italian treatise on international commercial arbitration:

If I am right, the best role each of us can play is that of bearer of our beliefs and ideals. If this is so, what matters is that these beliefs and ideals continue to be carried on, irrespective of who the individual bearer is.<sup>32</sup>

The believer is nothing, the belief is everything. But, note the “If I am right” in the beginning of the quote. How do we know if a dream is true, if our beliefs and ideals are the right ones? Often, in dream literature, not even the dreamer himself recognizes the meaning of his own dreams. Gilgamesh dreams of embracing a meteorite and an axe, but then he needs his mother to explain the meaning of the dream to him.<sup>33</sup> More often, however, the problem is the reverse: the visionary knows that he has seen the truth but others will just not believe him. This happens in the Bible, and it happens in international arbitration. Jan Paulsson, another famous arbitrator and centennial professor at the London School of Economics, reports “the terrifying experience of debating Francis Mann,”<sup>34</sup> the last staunch defender of localized arbitration.<sup>35</sup> Paulsson defended his own vision of

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*sister: medieval women and the epistolary genre* (University of Pennsylvania Press 1993) 46.

<sup>32</sup> M Rubino-Sammartano, *International arbitration law and practice* (Kluwer Law International, 2<sup>nd</sup> ed 2001) vii.

<sup>33</sup> A George, *The Epic of Gilgamesh: the Babylonian Epic Poem and Other Texts in Akkadian and Sumerian* (London: Penguin Books 2003) 10; Russell (above n \_\_) 23. The classical study remains Al Oppenheim, *The Interpretation of Dreams in the Ancient Near East, with a translation of an Assyrian Dream Book* ((Transactions of the American Philosophical Society, Volume 46/3 [1956]; Philadelphia, PA.: American Philosophical Society, 1956). See also SA Butler, *Mesopotamian conceptions of dream and dream rituals* (Münster, Ugarit-Verlag, 1998); B Näf, *Traum und Traumdeutung im Altertum* (Wissenschaftliche Buchgesellschaft 2004) 20-21. A psychological study is K Bulkley, ‘The evil dreams of Gilgamesh: an interdisciplinary approach to dreams in mythological texts’ in CS Rupprecht (ed), *The dream and the text: essays on literature and language* (SUNY Press 1993) 159.

<sup>34</sup> J Paulsson, ‘Arbitration in three dimensions’, LSE Legal Studies Working Paper No 2/2010, p 33. The passages here cited do not appear in the version later published in [2011] 60 *International and Commercial Law Quarterly* 291.

<sup>35</sup> See FA Mann, *Lex facit arbitrum*, in P Sanders (ed) *International arbitration—liber amicorum for Martin Domke* (1967) 1957.

denationalized arbitration but could convince no one, and went home like a defeated prophet: “It will take some time for these people to see the light, I thought as I dolefully retreated homeward.”<sup>36</sup>

Just as Moses needed Aaron to translate and confirm his compact with God to the ordinary people, such lonely prophets need others to tell whether the visionary speaks the truth, and translate from God’s vessel to the mortals. In theory, that could be anybody. In the reality of religion, it is often the church which professes expertise and aims at a monopoly on telling us which visions are actually inspired by God and which are just madness. In arbitration scholarship, the expertise on arbitration visionaries lies with—arbitration practitioners. Here is a prophetic quote from a book review:

When and if a true *lex mercatoria*, universally-recognized and clearly stated, is finally established, visionaries like Carbonneau, who have helped point out its advantages and prodded legal and academic institutions toward study and action aimed at global legal structures, can take credit for a job well done.<sup>37</sup>

When and if indeed. The reviewer is a partner at Jones Day, responsible for international arbitration.<sup>38</sup> He may thus qualify as an expert about the accuracy of visions on arbitration, just like the Catholic Church provides the experts on determining the truth value of visions. Of course he may also, dare I say it, be someone whose business would benefit if many people believed the vision. But that is true for the Catholic church as well: it rarely recognizes visions that run its own interests.

#### **D. Faith**

Note that faith is a necessary requirement here: we recognize God’s word as such in dreams and visions only if we believe. Again, we find this trope in the arbitration

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<sup>36</sup> Paulsson (above n 34) 33.

<sup>37</sup> SC Bennett, Book review (reviewing TE Carbonneau, *Lex mercatoria and arbitration: a discussion of the new law merchant*, Yonkers NY: Juris Publishing, rev’d ed 1998), (1999) 10 *American Review of International Arbitration* 159, 163.

<sup>38</sup> <http://www.jonesday.com/scbennett/>.

literature. Emmanuel Gaillard, head of Shearman Sterling's International Arbitration Practice, and chair of the International Arbitration Institute,<sup>39</sup> presents, in an ambitious theory of international arbitration, three alternative ways of grounding international arbitration in the nation state.<sup>40</sup> The first is to ground arbitration in the state in which the arbitration takes place. The second is to ground it in every state in which the ensuing award might be recognized. The third, finally, is to ground it in an imaginary community of states. Gaillard neatly demonstrates that these different 'representations', as he calls them, are in conflict with each other, and that this conflict is relevant: they actually yield different results on important doctrinal questions. Among these are the questions whether an international arbitral award can be recognized even if it has been annulled by a court in the place of the arbitration, or whether an arbitrator has to comply with an antisuit injunction rendered by a court.

So one would expect that Gaillard, after discussing these different representations, would tell us which of them is the most convincing. Instead of such a choice, we find a remarkable leap:

what is at stake are not matters that may be disposed of by scientific demonstration, but rather matters that belong to the realm of belief, of faith. There is no such thing as a right or wrong representation of international arbitration. As for every other vision or ideology, one may share it or not. It may be efficient or inefficient, but never right or wrong.

This is quite remarkable. After all, faith is used here to establish nothing less than the very foundations of the whole theory—the autonomy of arbitration. Precisely at the point, when arbitration must be legitimized (and therefore at precisely the point at which philosophy of law should furnish answers), we find, instead of an

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<sup>39</sup> <http://www.shearman.com/egaillard/>.

<sup>40</sup> E Gaillard, *Legal theory of international arbitration* (Martinus Nijhoff 2010).

argument, a genuinely Kierkegaardian leap from rationality to faith.<sup>41</sup> The legitimacy of arbitration itself, and thus the core of its identity, cannot be accessed by reason alone. What is achieved is thus not ultimate justification, but instead the formulation of a credo, on which the epistemic community is based and which holds it together. The community of delocalized law, it appears, is a community of faith.

It seems there is, in such approaches, no way to the promised land through pure reason alone. Julian Lew's dream of an autonomous arbitration, in order to become real, must remain a dream, grounded in faith. We will not have its hard reality unless we believe in it, and act accordingly. In the words of AT Jones' lesson on faith from 1898: 'The word of God is self-fulfilling, and to trust it and depend upon it as such, that is to exercise faith.'<sup>42</sup> In a remarkably similar sense, Basil Markesinis quotes from Count Zeppelin's tombstone in Constance, for a transnational law: 'First you dream; then you believe in your dream, and then it happens!'<sup>43</sup> The use of the quote is of course puzzling— the airship Zeppelin pioneered went up in flames in 1937, on arrival in New York.<sup>44</sup> But the quote itself is maybe even more puzzling in its open antirationality: the path from dreaming through believing to happening is a direct one; it eschews rational argument and needs no rational justification.

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<sup>41</sup> Cf MJFerreira, 'Faith and the Kierkegaardian Leap' in A Hannay and GD Marino (eds.), *Cambridge Companion to Kierkegaard* (Cambridge University Press 1998) 207.

<sup>42</sup> AT Jones, Lessons on Faith, RH Dec 7, 1898, available at <http://www.sdabol.org/sbhn/1888/lof3.htm>.

<sup>43</sup> B Markesinis, 'Understanding American Law by Looking at It Through Foreign Eyes: Towards a Wider Theory for the Study and Use of Foreign Law' (2006) 81 *Tulane Law Review* 123, 185.

<sup>44</sup> The quote is puzzling also because Count Zeppelin's tombstone is actually not in Constance but in Stuttgart, and because its inscription is actually completely different. See [http://www.stuttgart-im-bild.de/html/ferdinand\\_graf\\_von\\_zeppelin.html](http://www.stuttgart-im-bild.de/html/ferdinand_graf_von_zeppelin.html). Perhaps Markesinis was instead thinking of Anatole France's speech on the construction of the Suez Canal: 'pour accomplir de grandes choses il ne suffit pas d'agir, il faut rêver, il ne suffit pas de calculer, il faut croire.' *Séance de l'Académie française du 24 décembre 1896. Discours de réception de Anatole France* (Paris 1897) 21.

## E. Utopia

These dreams are thus paths to another world that is more true and more perfect – a utopia. My earlier quote’s reference to the time “when and if a true *lex mercatoria* is finally established”<sup>45</sup> is a reminder that utopias are not always about other places, they are also about other times. In most cases, those other times are the future.<sup>46</sup> Autonomous arbitration may be nowhere, but it is also always “yet to come”. It shares this look into the future with another utopia, socialism.<sup>47</sup> In Edward Bellamy’s *Looking Backward*, published in 1889, a young hero falls asleep after a socialist meeting – after, not during – and wakes up 113 years later, in 2000, in a Boston that displays considerably more socialism than just universal health care.<sup>48</sup> Everyone retires with full benefits at age 45, and may eat in any of the public kitchens. All means of production are owned by the state; all goods are equally distributed to its citizens. Private litigation has ceased (here the socialist dream differs from the arbitration dream), as has most crime; what crime remains is treated as a medical condition.

And sometimes, utopia is not in the future but in the past: not the promised land where the better among us may hope to live for eternity, but the garden of Eden from which we have been driven – or, more frequently yet, the Middle Ages, idealized in the nineteenth century by Sir Walter Scott and others.<sup>49</sup> William Morris, writing a short while after Bellamy, also describes a dream of a socialist utopia, but his dream vision, entitled “News from Nowhere” goes not to the future but to the past, an imagined idealized middle ages with no private property, no big cities, no

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<sup>45</sup> Above text at n \_\_\_\_.

<sup>46</sup> F Jameson, *Archaeologies of the Future: The Desire Called Utopia and Other Science Fictions* (Veso 2005).

<sup>47</sup> Eg K Taylor, *The political ideas of the utopian socialists* (Frank Cass & Co Ltd, 1982)

<sup>48</sup> Edward Bellamy, ‘*Looking Backward: 2000-1887*’ (Boston: Houghton, Mifflin & Co, 1889). An earlier dystopia with a similar pattern (the hero falls asleep and awakes, but this time to a significantly worse world) is the anonymous *Great Britain in 1841, or The Results of the Reform Bill* (Roake and Varty 1831).

<sup>49</sup> A Chandler, *A dream of order: the medieval ideal in nineteenth-century English literature* (Routledge & Kegan Paul 1971); CA Simmons, *Popular medievalism in romantic-era Britain* (Palgrave MacMillan 2011).



authority, no monetary system, no divorce, no courts, no prisons, and no class systems.<sup>50</sup> Authors like Scott and Morris are not interested in the Middle Ages as they really were. They use the Middle Ages as a counter-image to their own time. We speak in this context of medievalism—or, to describe the newly found love for the Middle Ages in more recent times, of neo-medievalism.<sup>51</sup>

Such medievalism exists in law as well, especially with regard to non-state law.<sup>52</sup> The Middle Ages are attractive because they appear to represent a model of governance that predates the modern State—and can therefore help to transcend it.<sup>53</sup> Scholars romanticize, for example, arbitration in medieval Iceland.<sup>54</sup> However, the most prominent equivalent to the romance of the middle ages in literature is found in the romance of the *lex mercatoria* (in fact, the title of an influential book)<sup>55</sup>. This is at the same time the purest example of what may be called legal medievalism. I quote from Julian Lew's own romance of this paradise lost, but one could quote countless other authors instead:<sup>56</sup>

In [the middle ages], the regulation of arbitration by national law was nonexistent or minimal. The business community was left free to structure and use an arbitration system it considered suitable for its needs. The early

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<sup>50</sup> W Morris, *News from Nowhere, or and epoch of rest, being some chapters from a utopian romance* (Boston: Roberts Brothers 1890).

<sup>51</sup> U Eco, 'Dreaming of the Middle Ages' in *Travels in hyperreality* (1986) 61; see also T Pugh and AJ Weisl, *Medievalisms: Making the past in the present* (Routledge 2012)..

<sup>52</sup> A di Robilant, 'Genealogies of soft law' (2006) 54 *American Journal of Comparative Law* 499, 518.

<sup>53</sup> The idea of medievalism was introduced into the field of International Relations by Hedley Bull, *The anarchical society: a study of order in world politics* (1977) 245-46, 254-55.

<sup>54</sup> D Friedman, 'Private creation and enforcement of law: a historical case' (1979) 8 *Journal of legal studies* 399; WI Miller, 'The submission of disputes to arbitration in medieval Iceland' (1984) 28 *American Journal of Legal History* 95; R Posner, 'Postmodern Medieval Iceland' in, *Overcoming Law* (Harvard University Press 1995) 312-24.

<sup>55</sup> WA Bewes, *The romance of the law merchant* (1923).

<sup>56</sup> Most recently, see, eg, BL Benson, 'The law merchant's story: how romantic is it?', in P Zumbansen and GP Calliess (eds), *Law, Economics and Evolutionary Theory* (Edward Elgar, 2011) 68, 73-85.

forms of arbitration often existed without the blessings of, and perhaps oblivious to, the judicial mechanisms and national laws of the sovereign states in which they operated and which may have been relevant. In fact, at that time arbitration was crafted specifically to facilitate the dispute resolution needs of a particular industry or a community. There was no need or desire to imitate the procedures of any judiciary; that was often precisely what the industries sought to avoid.

To determine these disputes, arbitrators applied relevant established custom, created out of the merchants' own needs and views, as the legal rules and standards according to which rights and obligations of the parties were determined, often shunning the legal technicalities and substance of local law. This was an international commercial law applicable to these international transactions--the *lex mercatoria* of those times.<sup>57</sup>

Now, literally none of this is historically true.<sup>58</sup> Adjudicatory processes in the middle ages were exclusively local and mostly run by official entities. Arbitration existed, but arbitrators were often not merchants of the trade of the parties, and what was expected from them was often adjudication based not on commercial needs but instead on love and empathy.<sup>59</sup> Sometimes the processes were indeed catered to the special needs of a certain industry, sometimes not. Further, an international commercial law, a substantive *lex mercatoria* outside the state, never existed. All that we find are special procedural mechanisms, but hardly any significant unified non-state law. In a time when it took weeks to travel from one fair to another, it is hard to see how such a law on a universal basis could have developed.

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<sup>57</sup> Lew (above n \_\_) .

<sup>58</sup> This has been shown in numerous studies and is, as far as I can see, in principle uncontested among historians. See, for the most recent and comprehensive study, E Kadens, 'The Myth of the Customary Law Merchant' (2012) 90 *Texas Law Review* 1153 with further references at 1157 n 6.

<sup>59</sup> AD Kessler, 'Enforcing Virtue: Social Norms and Self-Interest in an Eighteenth-Century Merchant Court' (2004) 22 *Law and History Review* 71.

The interesting aspect is not, however, that scholars proposing a new law merchant get the history wrong, but that they care about this history at all.<sup>60</sup> Indeed, the history is of interest to them, but this interest is quite different from the interest of historians, and therefore the findings of historians have only limited value for the project of lex mercatoria scholars. Historians aim at describing the actual Middle Ages to show how things actually were in the past. Arbitration scholars aim at invoking utopias of an imagined middle ages to show how things actually could and should be in the present. In looking back, the alleged medieval lex mercatoria becomes, in Nicholas Foster's word, a foundation myth.<sup>61</sup> In serving as a model, it becomes a utopia. And utopias cannot be falsified; after all, it is their main characteristic that they are *not* true in this world.

### III. Four criticisms

What follows? Does it matter if this literature is utopian? I want to suggest four critical responses<sup>62</sup>—three that strike me as ultimately unhelpful, and one that is actually powerful..

#### A. Sugar-Coating

A first response would be that the dream framework is a mere rhetorical trick to deceive opponents, to make palatable to them through the use of imagery what they would oppose if it were presented as hard facts. Perhaps one could say about Julian Lew's utopia of an unrestrained arbitration what a contemporary reviewer said about Bellamy's utopia of a socialist future, calling it a text "which in the sugar-coated form of a dream has exhibited a dose of undiluted socialism, which has

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<sup>60</sup> For the following, see, more extensively, R Michaels, 'Legal medievalism in lex mercatoria scholarship' (2012) 90 *Texas Law Review* See Also 259.

<sup>61</sup> NHD Foster, 'Foundation Myth as Legal Formant: The Medieval Law Merchant and the New Lex Mercatoria' [2005] *Forum historiae juris*, available at <http://www.forhistiur.de/zitat/0503foster.htm>.

<sup>62</sup> There is a long history of criticism of utopia. The seminal study is still G Kateb, *Utopia and its enemies* (New York: Schoecken, 1963). A more recent study that gives much attention to anti-utopians is K Krishan, *Utopia and Anti-Utopia in modern times* (Blackwell 1991).

been gulped by some of the most vigilant opponents of that theory without a suspicion of the poison they were taking into their system.”<sup>63</sup> The myth of a fully denationalized and autonomous private arbitral system, one may say, serves only to conceal the reality in which public state institutions are instrumentalized for private interests. It tries to make palatable a tension shown already by Dezalay and Garth’s sociological study pointed out long ago: International commercial arbitration is not merely a neutral and disinterested mechanism of dispute resolution; it is also big business.<sup>64</sup> Or, even more prosaically, arbitrators may need to rekindle the faith in international arbitration, because that is how they make their money. At least one quote from a practitioner lays out quite clearly the terrible consequences that would emerge from a lack of such faith. That they rely on such faith is openly admitted:

“[T]here seems to be a belief that international arbitration is facing a crisis of confidence that could jeopardise its pre-eminent status. That belief is a cause of concern for the individuals, firms, organisations and localities that have economic interests in the success and continued growth of arbitration, including lawyers, arbitrators, arbitration associations and administrative bodies and localities that have or hope to become major centres for arbitration proceedings. After all, international arbitration has become a big business (relatively speaking.)”

But the very existence of the quote (and others like it) proves that this explanation is not sufficient. It is probably correct that the arbitration practitioner-as-dreamer would benefit if his dream were to come true. But sugar-coating is present in all advertisements, and as I suggested earlier, most arbitration scholarship is also advertising.<sup>65</sup> More importantly, scholars writing about dreams of autonomous law do not, by and large, conceal this advertising aspect. In other words, the criticism does not go far enough: it explains why transnational law is presented in a favorable

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<sup>63</sup> William Dean Howells, ‘Editor’s Study’ 77 *Harper’s* (June 1888) 154-55.

<sup>64</sup> Dezalay & Garth (above n 5).

<sup>65</sup> Michaels (above n \_\_) 192-94.

light, but it does not explain the particular form of dreams, visions, and utopia in which this sugar-coating comes.

## B. Escapism

Here, then, is a second possible critique of utopian literature and of dream literature: Utopianism avoids reality and instead depicts alternative universes. If I mentioned utopian socialism as one example, it is worth recalling the anti-utopian strand in socialism, going back to Engels' and Marx's criticism of early utopian socialists like Fourier, Owen, and Saint-Simon.<sup>66</sup> The criticism of escapism has been made repeatedly also against transnational law, especially in the form of *lex mercatoria*. Klaus Peter Berger, himself a proponent of a *lex mercatoria* outside the state, reports on such criticism made against autonomous transnational law. Remarkably, he suggests that dream and utopia are mostly tropes not of supporters but of critics: "opponents ... attack the [new *lex mercatoria*] ... as legal utopia, a useful illusion or legal dreams of the future, as wishful thinking, and as a disguise for the marketing of own solution."<sup>67</sup> And he defends *lex mercatoria* by denying its utopian character:

"In this age of private governance and legal pluralism, the [new *lex mercatoria*] is not a myth or dream of the future. Today, transnational commercial law, the New *Lex Mercatoria*, is a fact of life."<sup>68</sup>

This is more an assertion than an argument.<sup>69</sup> But I also do not think that the utopian character of utopias as such is the problem. After all, utopias are mostly not about other places but about ours, not about other times but about our own. Bellamy's dream of the future is not called "Looking Forward" but "Looking Back," and it turns out that the people in his imagined Boston of the future have more to

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<sup>66</sup> See eg R Levitas, *The Concept of utopia* (Syracuse, NY: Syracuse University Press 1990) 35-58; D Leopold, 'The structure of Marx' and Engels' considered account of utopian socialism' (2005) 26 *History of political thought* 443.

<sup>67</sup> KP Berger (above n 22) 53-54.

<sup>68</sup> *Ibid* at 293.

<sup>69</sup> For my own doubts, see R Michaels, 'The true *lex mercatoria*: law beyond the state' (2007) 14 *Indiana Journal of Global Legal Studies* 447.

say about Bellamy's own time than about their own. In the end Bellamy cares less about the beautiful reality of the future than about the capitalist nightmare of his own present.<sup>70</sup> The same is true for proponents of transnational law, as Nikitas Hatzimihail has rightly said: 'what matters, for the debate, is not so much what actually happened, but what projections into the past align best with present circumstances and what constructions of the past are used to justify explanations of the present.'<sup>71</sup>

Look at how dreams are used in literature. Dreams are presented not as irrational other worlds but critiques of, and or models for, our own world. When Cicero, towards the end of his Republic, describes a dream of Scipio – the dream that becomes the most important model for the dream literature of medieval England<sup>72</sup> – this dream is little more than a replication of the conservative image of the state he has laid out before.<sup>73</sup> A dreamer who stays in his dreams—Bunyan's pilgrim is a (rare) example—could be called escapist. Otherwise, in almost all dream literature, we find a different pattern:<sup>74</sup> the dreamer falls asleep in a situation of great distress over the troubles of our own world, he is then transported into another space or time that he finds to be perfect, and finally, and crucially, he awakes in the here and now, relieved of his former troubles, and ready to tell us others about the dream.

Examples exist in arbitration literature, too. "News and Views," the regular publication of the Chartered Institute of Arbitrators, published, in a 1998 issue, a so-

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<sup>70</sup> Or even beyond, that of a lost past. See M Cantor, 'The backward look of Bellamy's Socialism' in D Patai, *Looking Backward, 1888-1888: Essays on Edward Bellamy* (University of Massachusetts Press 1988) 3.

<sup>71</sup> NE Hatzimihail, 'The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law' (2008) 71 *Law and Contemporary Problems* 169, 173.

<sup>72</sup> K Lochrie, 'Sheer Wonder: Dreaming Utopia in the Middle Ages' (2006) 36 *Journal of Medieval and Early Modern Studies* 493-516

<sup>73</sup> Russell (above n ) 7-10.

<sup>74</sup> Russell (above n) 5-6.

called “Report of Fact-Finding Visit to Utopia.”<sup>75</sup> In this report, the country Utopia had an arbitration act that looks almost exactly like the 1996 UK Act. There was only one difference: “In the Utopian version, all of the arbitrator’s powers are mandatory and subject to the unfettered discretion of the arbitrator, the parties cannot by agreement increase or limit the power of the arbitrator.” As a consequence of this difference, everything works fine in Utopia. The report ends with the usual return to the miseries of our world: “After such an enlightening experience, it was so disappointing to return to England and find that nothing had really changed and our process still felt as though we were wading through treacle.”

In fact, the proposal of a better alternative world that permeates all utopian literature always comes first and foremost as a critique of our own world. Neither Plato nor Thomas More are interested in alternative universes. They use dream and utopia in order to critique the world of their time. In the case of autonomous arbitration, this critique is directed against the national character of law and the positivism of its sources. National commercial law is said to be inconsistent with the requirements of a global economy. Positivism with its limited view of law as emerging from a sovereign is said to be insufficient for a world in which much law is made by non-state actors: legal practitioners, arbitral panels, but also so-called formulating agencies<sup>76</sup> like the International Chamber of Commerce and the International Swaps and Derivatives Association. The dream of autonomous arbitration speaks less to the other world – that of arbitrators – and more to ours – that of state courts and judges. After all, state courts are asked to enforce arbitration agreements, even in the face of antisuit injunctions. State courts are asked to enforce arbitral awards, even if these awards have been annulled in their home country. Arbitration non-place law becomes anything but that: it is presented as a reality to

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<sup>75</sup> I found this text at <http://www.arbitrate.org.uk/nvjan98/utopia.htm>. However, the website seems no longer functional, and I have not succeeded in finding another source.

<sup>76</sup> Gerold Herrmann, *Law, International Commerce and the Formulating Agencies—The Future of Harmonisation and Formulating Agencies: The Role of UNCITRAL* (2000); Klaus Peter Berger, *Creeping Codification* (above n \_\_) 88ff.

be accepted by us, in our place. Utopia provides ideas about other worlds, but the solutions it suggests are solutions for ours.

### C. Anti-rationalism

This gives way to a third criticism: if utopian literature is about our world rather than another, why should we have to rely on dreams, faith, vision, to embrace it? Autonomous arbitration, non-state laws, are quite radical ideas. Should we not demand that they be justified by reason and empirics instead of dreams and faith? Do we not deserve concrete reform proposals that can be discussed and, if needs be, rejected, instead of lofty imaginations? Is not ours a time, maybe the first one, that does not require myth and dreams to propose a better future?<sup>77</sup>

The answer is not as clear-cut as we may think at first. Consider this: our current paradigm of law, that of national positivism, the paradigm that transnational law tries to overcome, is also built, ultimately, on faith.<sup>78</sup> Take the rule of recognition – H.L.A. Hart’s suggestion that the normative bindingness of positive law rests on the socially observable fact that people in fact recognize the rulemaking power of the sovereign.<sup>79</sup> Not only is this recognition itself, quite possibly, a myth<sup>80</sup> (just as Kelsen’s *grundnorm* is a fiction). What other ground exists for this recognition than the people’s faith in the lawmaking authority of the sovereign? In legal positivism, the basis of all law lies in the sovereign state. But the state itself is a myth, as

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<sup>77</sup> S Heller, *The Absence of Myth* (SUNY Press, 2006). For an insightful analysis of the changed character of utopian literature after the postmodern turn, see R Levitas, For utopia: the (limits of the) utopian function in late capitalist society, 3 *Critical review of international social and political philosophy* 25 (2000).

<sup>78</sup> See generally P Fitzpatrick, *The mythology of modern law* (1992); see also WE Conklin, The invisible origins of legal positivism: a re-reading of a tradition (Kluwer 2001), who argues that legal positivism, like natural law, rests ultimately on “invisible” foundations; C Fonarelli, International law as social construct: The struggle for global justice 50-51.

<sup>79</sup> HLA Hart, *The concept of law* (Oxford University Press, 2<sup>nd</sup> ed 1994) chapter 5.

<sup>80</sup> Fitzpatrick (above note 78) 183-210; JL Schroeder, ‘Totem, taboo and the concept of law: myth in Hart and Freud’ (2009) 1 *Jurisprudence Review* 139.



Cassirer reminds us,<sup>81</sup> and sovereignty as a legal concept rests not on the actual force of the sovereign but instead on our mutual faith in it.<sup>82</sup>

Historically, legal positivism did not prevail over the earlier paradigm of natural law because it was more rational, or less reliant on faith than natural law. Instead, legal positivism prevailed because, in its time, the faith it required was more convincing than the earlier faith. Natural law had presumed a certain unity – a unity of religion where law was based in God’s will, a unity of reason where law was based in reason. When this unity became questionable in times of religious pluralism, legal positivism became a response to the crisis of that unity. Now that a transcendent truth could no longer be found outside society, it had to be sought either in the will of a ruler, or within the compromises that society was able to make through the political process.<sup>83</sup>

Now, in the same way in which legal positivism reacted to a crisis of natural law, the literature on transnational law can be viewed as a sign for the crisis that legal positivism is suffering today.<sup>84</sup> That crisis of legal positivism comes from two connected developments. The first development is globalization – the transcendence of national boundaries in commerce and communication.<sup>85</sup> The second development is privatization – the growing importance of norms formulated and enforced by non-state entities.<sup>86</sup> And globalization and privatization, taken together, arguably call for

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<sup>81</sup> E Cassirer, *The myth of the state* (1946)

<sup>82</sup> SD Krasner, *Sovereignty: organized hypocrisy* (Princeton University Press 1999).

<sup>83</sup> See also P Fitzpatrick, *Modernism and the grounds of law* (Cambridge University Press 2001).

<sup>84</sup> See only GP Calliess and P Zumbansen, *Rough consensus and running code: a theory of transnational private law* (Hart Publishing, 2010). For an attempt to recreate a Hartian legal positivism that can incorporate transnational and non-state law, see D von Daniels, *The concept of law from a transnational perspective* (Ashgate 2010).

<sup>85</sup> R Michaels, ‘Globalization and law: law beyond the state’ in R Banakar and M Travers (eds), *An introduction to law and social theory* (Hart Publishing, 2<sup>nd</sup> ed 2013).

<sup>86</sup> R Michaels and N Jansen, ‘Private law beyond the state: europeanization, globalization, privatization’ (2006) 54 *American Journal of Comparative law* 845, 868-71.

a global private law – autonomous arbitration, and a new *lex mercatoria*. If the faith in sovereignty no longer holds, a new faith must be developed. We may thus criticize the particular faith that is being asked from us by the proponents of *lex mercatoria*. But in view of the development of law up until today, it seems exaggerated to criticize these proponents for propagating faith at all.

In a sense, the criticism has it exactly backwards. It suggests that crisis is no time for utopia; it requires rationality. If we look back at history we find the opposite: dream and myth are especially prominent, and perhaps especially important, in times of crisis.<sup>87</sup> When a paradigm shift is needed, it is necessary to try and think outside the current paradigm, and that means: to move, deliberately or not, to that which is not (yet). As Paul Tillich suggests, “Utopia opens up possibilities which would have remained lost if not seen by utopian anticipation.”<sup>88</sup> In this sense, Niki Lacey has praised utopian thought as an avenue for feminist legal scholars,<sup>89</sup> and international lawyers like Philipp Allott, Ronald Macdonald and Antonio Cassese have drafted explicitly utopian worldviews.<sup>90</sup> When Martti Koskenniemi places international law argument between apology and utopia,<sup>91</sup> his critique of both positions is neither blind to the impossibility to avoid both, nor particularly unsympathetic to the utopian project of international law.

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<sup>87</sup> \_\_\_ in Campbell ).

<sup>88</sup> P Tillich, ‘Critique and justification of Utopia’ in FE Manuel (ed) *Utopias and utopian thought* (Boston: Houghton Mifflin 1966) 296, 297.

<sup>89</sup> N Lacey, ‘Normative Reconstruction in Socio-Legal Theory’ in *Unspeakable subjects: feminist essays in legal and social theory* (Oxford: Hart 1998) 221.

<sup>90</sup> Philipp Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press 1991); Allott, *The Health of Nations: society and law beyond the state* (2002); R StJ Macdonald, GL Morris and DM Johnston, ‘International Law and Society in the Year 2000’ (1973) 51 *Canadian Bar Review* 316; cf K Knop, ‘Utopia without apology: form and imagination in the work of Ronald St John Macdonald’ (2002) 40 *Canadian Yearbook of International Law* 287. See also A Cassese, ‘Introduction’ in *Realizing utopia: the future of international law* (Oxford University Press 2012) xvii.

<sup>91</sup> M Koskenniemi, *From Apology to Utopia: the structure of international legal argument* (reissue, Cambridge University Press 2005, orig. 1989); see also Koskenniemi, ‘Introduction. International Law as a Modernist Utopia’ in J Crawford and M Koskenniemi (eds) *The Cambridge Companion to International Law* (2012).

After all, rationality may be merely the particular thought pattern of the status quo. Karl Mannheim has suggested a rather simple but helpful distinction between ideology, which is objectionable, and utopia, which is desirable. Ideology is, for Mannheim, the thought system of the status quo—in principle conservative, anathema to change, suppressive. Utopia, by contrast, is the thought system of the marginalized—an escape from such suppression of thought, the path to change and a better life.<sup>92</sup> This is not unproblematic, not least because it does not sufficiently account for how utopias can become ideologies once they are put into practice. (It is also doubtful, applied to international arbitration, whether the arbitration community can really claim the role of the suppressed.) But it suggests that utopia may, at least, for a certain period, be the only way to overcome the constraints of the present.

#### **D. Totalitarianism**

If, as in Mannheim's distinction, utopia may change into ideology, then once utopia is realized, it is no longer a liberator from oppression; it may itself become the oppressor. Ernst Bloch's suggestion that utopia is antitotalitarian—a means, perhaps the only one available, for the suppressed to overcome, if only (at first) in dreaming, the constraints of the world in which they live—then this applies only to unfulfilled utopia.<sup>93</sup> This suggests that the real problem with the utopia of delocalized arbitration lies in a fourth criticism. The most powerful criticism of utopia is not that it is unreal, but that its proposed reality, taken seriously, is actually frightening. It can "have a charm of its own as long as it is a dream, but turns into a fool's paradise as soon as it is realized."<sup>94</sup> Many utopias present us with perfectionist and therefore static images of the world: they are not open to

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<sup>92</sup> K Mannheim, *Ideology and utopia: an introduction to the sociology of knowledge* (London: Routledge, 1991). See already K Mannheim, *Utopia*, in (1935) 15 *Encyclopedia of the Social Sciences* 200.

<sup>93</sup> E Bloch, *The utopian function of art and literature: Selected Essays* (Cambridge, MA: MIT Press 1982); E Bloch, *The Principle of Hope* (transl by translated by N Plaice, S Plaice, and P Knight, Cambridge, MA: MIT Press, 1986).

<sup>94</sup> H Arendt, *The human condition* (U of Chicago Press 1958) 133.

improvement and development.<sup>95</sup> We read with some pleasure about utopias; we would rarely want to live in them.

So this is utopia, is it? Well-

I beg your pardon; I thought it was hell.<sup>96</sup>

Recall the criticism Sir Karl Raimund Popper voiced against Plato, Hegel and Marx.<sup>97</sup> He took them to task not just for the utopian character of their visions of the world, but for the totalitarian aspect in them, which he viewed as anathema to an open society. More recently, this argument from political philosophy has received a sociological bent: Runciman argues that Plato, Hobbes and Marx have insufficient understanding of the production of order in society: they think it can be brought about only through a despot.<sup>98</sup> Indeed, as Rouvillois argues, utopia and totalitarianism are interconnected:

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<sup>95</sup> Thus eg the critique by I Berlin, 'The decline of utopian ideas in the West' in *The crooked timber of humanity* (Knopf 1991) 20:

Broadly speaking, western Utopias tend to contain the same elements: a society lives in a state of pure harmony, in which all its members live in peace, love one another, are free from physical danger, from want of any kind, from insecurity, from degrading work, from envy, from insecurity, from degrading work, from envy, from frustration, experience no injustice or violence, live in perpetual, even light, in a temperate climate, in the midst of infinitely fruitful, generous nature. The main characteristic of most, perhaps all, Utopias is the fact that they are static. Nothing in them alters, for they have reached perfection: there is no need for novelty or change; no one can wish to alter a condition in which all natural human wishes are fulfilled.

But cf also the defense of utopian literature by LT Sargent, 'A note on the Other Side of Human Nature in the Utopian Novel' (1975) 3 *Political Theory* 88.

<sup>96</sup> The quote stems from a handwritten note by Max Beerbohm on the verso of an autograph of one of his poems; see JG Riewald, *Max Beerbohm's Mischievous Wit: A literary achievement* 53-54; see also T Gibbons, *Max Beerbohm and the shape of things to come* (2009) <http://dl.lib.brown.edu/mjp/pdf/GibbonsBeerbohm.pdf>.

<sup>97</sup> KR Popper, *The open society and its enemies* (2 Vols). Of course, Popper's anti-utopianism has not gone uncontested. See, eg, L Sargisson, 'The curious relationship between politics and utopia' in T Moylan and R Baccolini (eds) *Utopia method vision* (Peter Lang 2007) 25.

<sup>98</sup> WG Runciman, *Great books, bad arguments: "Republic", "Leviathan", and the "Communist Manifesto"* (Princeton University Press 2010). See already R

On the one hand, the most blatant utopias with their obsession to rehabilitate man and condemn him to happiness do indeed reveal traits that we habitually attribute to totalitarian systems. On the other hand, totalitarian systems – Fascism, Nazism, Stalinism or Chinese Socialism – even when they don't acknowledge the connection, invariably remind us of utopias, whose goals, mottoes, and means they appropriate.<sup>99</sup>

Proponents of autonomous international arbitration will reject such criticism as inapplicable to international arbitration and *lex mercatoria*. Autonomous arbitration and self-made law, so they may argue, are the exact opposites of totalitarianism, because they rest entirely on freedom, here expressed as party autonomy.<sup>100</sup> After all, their whole *raison d'être* is to avoid the totalitarianism inherent in the state's monopoly on adjudication and law production. Autonomous arbitration does not require a despot to be brought about; it represents the absence of all despotism.

And yet, at closer look, the dream of autonomous arbitration does reveal its own totalitarian potential. A world in which everything is ultimately grounded in individual consent would be a world in which nothing other than individual consent matters. It is a place without love or hope, a place without sympathy or other feelings. It is a place of individuals, not of community. It is a world that has no actual freedom, because it confines freedom to party autonomy. And, notably, it is a place

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Dahrendorf, 'Out of utopia: towards a reorientation of sociological thinking' (1958) 64 *American journal of sociology* 115.

<sup>99</sup> F Rouvillois, 'Utopia and Totalitarianisms' in R Schaer, G Claeys and LT Sargent (eds), *Utopia: the search for the ideal society in the Western world* (Oxford University Press 2000) 316, 316. See already I Kamenetsky, 'Totalitarianism and utopia' (1964) 16 *Chicago Review* 114.

<sup>100</sup> For arbitration, cf Born (above n 20) at 2: "As a rule, where totalitarian regimes or tyrants have held sway, arbitration—like other expressions of private autonomy and association—has been repressed or prohibited; where societies are free, both politically and economically, arbitration has flourished." See also J Werner, 'The Independence of Arbitrators in Totalitarian States—Tackling the Tough Issues' (1997) 14 *Journal of International Arbitration* 141. For *lex mercatoria*, see eg BL Benson, *The Enterprise of Law: Justice without the State* (Independent Institute, 2<sup>nd</sup> ed 2011).

from which politics is absent. It is a place in which everything has been subjected to the totalitarianism of economic reasoning.<sup>101</sup>

The reality of international arbitration is not—of course—such a place. Although many still try to base everything that goes on on the parties' consent, this often becomes more and more of a fiction—as in the example that the application of mandatory rules against the content of a contract is somehow desired by the parties. Empathy does play a role and is sometimes praised.<sup>102</sup> There exists a transnational epistemic community of international arbitration that transcends individuals (though it excludes many others). And, of course, politics matters, although it is disputed to what degree and in what way. This idealized world, in other words, is not realistic. In our real world, we will continue to see the fruitful tensions between market claims for autonomy and state claims for political control, between economic rationalities that become increasingly globalized and democratic processes that remain, for the time being, in the realm of states.

But, perhaps more importantly, such an idealized world is also not desirable. The crisis of legal positivism has made democratic control of law harder, but it has not shattered our belief – our faith, if you will – that such democratic control of law remains necessary. It is not only states that would fear an autonomous arbitration. It is us, the society of the world that wants to remain able to limit this autonomy where core issues of justice and democracy are at stake. And, perhaps, even the community of international commercial arbitration would not really want such a development. The dream of autonomous arbitration is presented as a dream not only because that is the form in which utopias frequently exist, or because it expresses something that is not yet real. It is also presented as a dream because this form enables it to remain a thought experiment, without real world implications.

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<sup>101</sup> Cf A Riles, 'Market Totalitarianism' (2013) 115 *American Anthropologist*.

<sup>102</sup> R Golick, The human condition: its impact on arbitral thinking (2012) as reported by AA Symonette, The human condition: its impact on arbitrator selection, disclosure and arbitrator bias, [http://www.americanbar.org/content/dam/aba/events/labor\\_law/2013/02/adr\\_in\\_labor\\_employmentlawcommitteemidwintermeeting/q.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/2013/02/adr_in_labor_employmentlawcommitteemidwintermeeting/q.authcheckdam.pdf).

Now, such totalitarianism, or perfectionism, is not intrinsic to all utopian thought. Russell Jacoby distinguishes, helpfully, between blueprint utopias (that are oppressive) and iconoclastic utopias that refuse to draw a future in details, that instead allow for creativity and freedom.<sup>103</sup> In a parallel line, Lyman Tower Sargent suggests that utopias may be of limited value as blueprints for actual political or sociological projects, even if they can be defended as literature.<sup>104</sup> In other words, arbitration scholarship could actually be exciting, liberating, utopia—if indeed it laid out dreams and visions, not meticulous details. But alas, as literature, most arbitration scholarship is a huge disappointment. To return yet once more to Julian Lew’s article, the talk of dream and nightmare is over fairly soon. What follows is a detailed technical discussion of doctrinal details. The same can be said of most other texts. These texts do mention dreams and visions, and thus aim to partake in the utopian project, but in the end, they remain uncreative and technical, technocratic instead of liberating.

#### IV. Conclusion

If I am right, then, the ain problem with Lew’s “Achieving the dream” – is not in the dream; it is in the achieving. The dream, the idea, could be interesting, provocative, exciting, thought-provoking, paradigm-shifting, helpful. (It is also, I think, ill-conceived and potentially dangerous, but that is not my topic here.)<sup>105</sup> Turned into a proposal for reality, however, the dream suddenly looks not only woefully incomplete, but also positively scary.

Let me quote once more Celia Wasserstein Fassberg:

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<sup>103</sup> R Jacoby, *Picture Imperfect: Utopian thought for an anti-utopian age* (Columbia University Press 2005) xiv.

<sup>104</sup> LT Sargent, ‘Authority & Utopia: Utopianism in political thought’ (1982) 14 *Polity* 565.

<sup>105</sup> Michaels, n 9 above.

In this [utopian] mode, a historical model only needs to offer ideal characteristics of the phenomenon that is advocated. It does not need to be more than an idea.<sup>106</sup>

I agree and would just like to sharpen the last point. Not only does the model not *need* to be more than an idea; it also *should* not be more than an idea. Our world is infinitely more complex than the sterile dreams and utopias presented in the literature. International commercial arbitration as an imagined purely private institution is embedded within society with all its conflicts and demands, and necessarily interacts with that society. Arbitration has unavoidable spillover effects on the rest of society: it affects the distribution of assets and resources, it affects the rights of employees and consumers, it reduces or enhances the power of monopolists, it reduces or enhances environmental injuries, and so on and so forth. Society, in turn, will continue to make demands on international commercial arbitration, to hold it responsible, to deny it full autonomy. Compared to this, utopian dreams of an autonomous law outside of such demands could be exciting and thought-provoking, utopian or dystopian.

In the end, then, I suggest we should not criticize the arbitration literature for its use of utopia, dream, and myth. We would be better off if we had more, not fewer, of such utopias and myths. We would be better off with more visions, more creativity, more actual radicalism in arbitration scholarship. Where existing scholarship goes beyond the analysis of detailed doctrines, it gives a hint of how exciting it could actually be. But unfortunately, this is usually no more than a hint. If, as I have tried to show, it can be understood as utopian literature, then it is also disappointing utopian literature. Too often, the tropes of dreams and visions are used as mere introductory devices, as steps to overcome a weakness in the argument instead of actual bridges to liberation and creativity. Compared to such shallow dreams, we should prefer to be awake.

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<sup>106</sup> Wasserstein Fassberg (note 6 above) at 68.